No. 2577

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Coca Cola Company,
Appellée,
vs.
Rose Orr and Frank L. Orr,
Doing Business as Orr Drug
Co., or Orr Pharmacy,
Appellants.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF FACTS.

May It Please Your Honors:

This is an appeal, by the defendants, from an order and decree dismissing the action, without prejudice, upon motion of the plaintiff over the objection of defendants.

The action as shown in the Bill of Complaint [see Tr. pages 5 to 10] is an action in equity for an injunction and accounting for profits, commonly referred to by lawyers as an action for "unfair trade"; that is to say, the plaintiff pleads a trademark by

user in the name of a beverage known as "Coca Cola" and alleges that the defendants—who are druggists—have infringed its rights by selling something other than "Coca Cola" as such.

The plaintiff sets up in its Bill of Complaint that it is a corporation existing under the laws of the state of Georgia; that the defendants are druggists in the city of Los Angeles, California. The complaint then alleges: "That the jurisdiction of this court arises by reason of the diversity of citizenship of the parties hereto, and in that the matter here in dispute exceeds the sum or value of $3,000, exclusive of interest and costs." It alleges that the plaintiff has been since 1892 the manufacturer of a beverage known as "Coca Cola," and that it had established a large and valuable trade therefor in the city of Los Angeles; that the beverage was made in the form of a syrup and mixed with carbonated water, and in that form sold at soda fountains or in bottles to consumers. It alleges that it had expended large sums of money in advertising this beverage and that it was sold throughout the United States and universally known to the trade by this name. It then states that the syrup is colored with caramel and has a distinctive color. It alleges that it has the sole and exclusive right to use this name.

In the sixth paragraph of the complaint the allegation is made that the defendants at their place of business in Los Angeles have maintained an unfair competition with the plaintiff, and that the defendants have delivered and sold, and were so doing at the

time of the beginning of the action, a spurious beverage, the color whereof is in simulation of the plaintiff's as and for the carbonated drink made from plaintiff's "Coca Cola" syrup; that the defendants have thus diverted profits from the plaintiff; and alleges that the plaintiff was without adequate remedy at law.

The bill prayed for an injunction against the defendants, their agents, clerks, etc., from selling any beverage other than Coca Cola as such; from marketing a product of similar color. The prayer also asks for accounting of profits and damages.

The action was begun by filing of this bill on or about December 11, 1916. [Tr. page 11.] On this latter date an order to show cause why a preliminary injunction should not issue was granted. [Tr. pages 14-15.] The preliminary motion for an injunction was made upon the Bill of Complaint and ten affidavits [see Tr. Index and Tr. pages 25 to 64].

The defendants answered, denying specifically all material allegations of the bill, and particularly denying that they had ever in any way or manner infringed the rights of the plaintiff in its trademark by selling any other beverage, whether inferior or otherwise, as and for "Coca Cola."

The answer of the defendants was supported upon the motion by certain affidavits and exhibits, as shown by the record [see Tr. pages 64 and 85].

The motion was argued before Hon. Benjamin F. Bledsoe on January 2nd, 1917, and thereupon an order was made denying the application for an injunction *pendente lite,* the order being dated February

17, 1917. [Tr. pages 86-87.] On January 8th, 1917, the plaintiff caused the action to be set for trial and the same was set down for trial for the 16th day of February, 1917. [Tr. page 88.] On January 31st, 1917, the plaintiff served and filed a notice and motion to dismiss the action, "without prejudice to the bringing of another cause of action on the same alleged facts by complainant." [Tr. page 91.] This motion was resisted by the defendants, their attorney filing an affidavit in objection to the motion [see Tr. pages 87-90] and arguing the matter. The motion was heard before the Hon. Oscar A. Trippet on February 5th, 1917, and an order entered on February 17th, 1917, dismissing the cause without prejudice [Tr. pages 92-93]. On February 13th, 1917, a decree dismissing the bill without prejudice was filed and entered of record. [Tr. pages 94-95.]

The petition for appeal was dated February 14th, 1917, and appears in the Transcript, pages 96-97, and the order allowing the appeal appears in Transcript on page 101. The assignment of errors appears in the Transcript on pages 97-100.

Resisting the motion to dismiss, the defendant claimed that the injunction having been denied in effect permitted them to continue business until the action was tried, the action having been set down for trial by the plaintiff.

The affidavit of plaintiff's attorney stated among other things as follows [Tr. pages 87-89]:

"This affiant further says that thereafter and on the 8th day of January, 1917, the said cause was, by

the said plaintiff, through its attorneys, set down for trial in said court for the 16th day of February, 1917, at 10 o'clock a. m. of said day, and notice of trial, namely, of said order setting said cause for trial, was served upon the attorney for said defendants on January 23rd, 1917."

Further on the affidavit says:

"That this affiant has been informed by the counsel and attorney for plaintiff that if said cause is dismissed the said plaintiff intends to immediately begin an action in the Superior Court of Los Angeles county against the said defendants upon the same identical cause of action and state of facts herein involved, and that the purpose of seeking the dismissal of this case is that the said plaintiff desires to transfer said cause of action into the state court of the state of California and to prosecute the same therein."

The order of dismissal, after the usual recitations, is as follows:

"It is ordered that complainant's said motion to dismiss this cause without prejudice be and the same hereby is granted, to which ruling of the court, on motion of defendants and by direction of the court, exceptions are hereby noted herein on behalf of said defendants." [Tr. page 93.]

The decree [Tr. page 94] reads in part as follows: "Complainant having moved the above-entitled court on the 5th day of February, 1917, for an order dismissing said cause upon the payment of defendants' costs herein without prejudice to the bringing of

another suit on the same alleged facts by complainant, and said motion having been argued by counsel, and the court having granted said motion * * *

Now, therefore, it is hereby ordered, adjudged and decreed that complainant's bill of complaint herein be and the same is hereby dismissed without prejudice to the bringing of another suit or cause of action by complainant on the same alleged facts, and it is further ordered, adjudged and decreed that defendants do have and recover of complainant their costs herein incurred."

The defendants contend that the action should either have been dismissed upon its merits or a dismissal should have been denied and the cause tried.

The defendants' assignments of error follow:

Assignment of Errors.

The defendants by their counsel and solicitor, Sidney J. Parsons, now show that the order made and entered in the above-entitled cause on the 5th day of February, 1917, granting the motion to dismiss plaintiff's bill of complaint, and the decree entered in said cause on the 13th day of February, 1917, by which it was ordered, adjudged and decreed that the said bill of complaint be dismissed, and each of the same, are erroneous and unjust to said defendants and each of them upon the following grounds:

First. That it appears by the said plaintiff's bill of complaint that this court has jurisdiction in said matter, and the said plaintiff and complainant so

alleges; that said bill of complaint was one for injunction for unfair trade or the infringement of a trademark by user, which trademark the defendants were charged with having infringed by selling something else as and for "Coca Cola."

Second. That the said plaintiff and complainant came into court and asked for a preliminary injunction and filed affidavits and exhibits in support of its motion, and thereby put the said defendants to great cost and expense in preparing their defense herein. and that the said plaintiff and complainant thereby selected their forum, the said plaintiff being a nonresident of the state of California, and the defendants residing in said state.

Third. That said matter was fully heard before this court and said preliminary injunction was denied; that thereafter the said plaintiff and complainant, through its attorneys and solicitors, set said cause for trial for February 16, 1917; that thereupon the defendants began the preparation for said trial and were put to still further cost and expense in said matter.

Fourth. That by said proceeding and trial of said motion for preliminary injunction, and the setting of the said cause for trial, the said court in part determined said cause and made therein a decretal order sustaining the right of the said defendants to continue their business as theretofore conducted until the further order of said court, or the final determination of said cause, and that the said defendants thereby acquired the right to have said matter so continued and

to have said matter finally determined in said court without being subjected to litigation in some other or different court as threatened by the said plaintiff.

Fifth. That the said plaintiff had no right, after thus proceeding in said cause, to have said cause dismissed and to harrass said defendants by an action or actions brought in the courts of the state of California; that said proceedings now taken by said plaintiff and complainant is a trifling with the court, and unjust and inequitable, and contrary to the law and the rules of equity, and repugnant to the dictates of justice; and that the order of said court dismissing said cause is contrary to law, unjust and inequitable; and that the decree entered in pursuance of said order dismissing said cause is against law, unjust and inequitable; and that the said defendants should have been allowed to have said matter heard in the forum selected by the plaintiff, and that the said order and decree in pursuance thereof, dismissing said cause, should be reversed, and that said court should retain jurisdiction of said cause, to prevent a multiplicity of suits and to do full justice between said parties.

Wherefore the defendants pray that said order and decree be reversed and the said District Court of the United States for the Southern District of California, Southern Division, be directed to set aside the said decree and order of dismissal and to reinstate the said cause, and that the same be tried; or that said cause be reversed and the said District Court be instructed to enter a decree dismissing the said cause on its merits, or that the Circuit Court of Appeals shall

reverse the said cause and render a proper decree upon the record, and said defendants and their solicitor will ever pray. [See Tr. pages 97-100.]

LAW POINTS.

1.

An Appeal Lies From an Order and Decree Allowing or Denying a Motion to Dismiss the Plaintiff's Bill.

Bush Electric Company v. California Electric Light Co., 51 Fed. Rep. 567 (S. C. 52 Fed. 945).

2.

To Justify an Injunction in a Case of Alleged Unfair Competition, Such as This, the Plaintiff's Case Must Be Clear in All Respects. The Plaintiff, Upon the Record, the Bill, Affidavit and Exhibits, Was Met at Each Point by the Defendants' Answer, Affidavits and Exhibits. The Plaintiff Utterly Failed to Make Out a Case and the Order Denying an Injunction Was Properly Entered.

Hanover Mill Co. v. Metcalf, 240 U. S. 403 (1915) (special attention is called to pages 412 to 414);

Postal Tel. Cable Co. v. Netter, 102 Fed. Rep., p. 691;

N. Y. Asbestos Mfg. Co. v. Ambler Asbestos Air Cell Covering Co., 102 Fed. 890;

C. O. Burns v. W. F. Burns Co., 118 Fed. 944;

Coca Cola Co. v. Branahan, 216 Fed. 264.

3.

A Dismissal by an Order as of Course Is Not Known in the Federal Practice. The Plaintiff Cannot Dismiss Without a Motion and Notice, and an Order of Court.

Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 604;

Gregory v. Pike, 67 Fed. 837;

Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

4.

The Plaintiff Will Not Be Allowed to Dismiss if in the Light of the Proceedings the Defendant Is Reasonably Entitled to a Decree, and Upon the Record the Defendants Were So Entitled, We Claim.

Chicago and A. R. Co. v. United Rolling Mill Co., 109 U. S. 713-716;

Hershberger v. Blewett, 55 Fed. 170;

Pullman Palace Car Co. v. Central Transf. Co., 171 U. S. 146;

Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87;

Bank v. Rose, 1 Rich Eq. 292;

Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

5.

"Decree" and "Decretal Order" Defined.

(a) In Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 Fed. Rep. 554, the court says:

"It is proper, therefore, to assume that when Congress undertook to enlarge the right of appeal it did so in the full light of the history of appeals in equity causes, and with a full appreciation of the distinction between interlocutory orders or decrees and final decrees. What the Congress meant by an interlocutory decree, granting or continuing an injunction, is to be ascertained by interpreting the technical terms used in the act according to their usual significance in courts proceeding according to the well-known principles, rules and usages of courts of equity. Thus, an appeal is allowed from an interlocutory 'order' or 'decree.' *A preliminary order, by which no question is determined upon the merits, and no right established, is termed a 'decretal order,' in distinction to an interlocutory decree, by which something touching the merits is adjudged.* Such an order was seldom regarded as subject to appeal. 2 Daniell, Ch. Pl. & Prac. (Orig. Ed.) 637. *The author just cited, at page 631, defines a decree as 'a sentence, or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience.' 'It is either interlocutory or final. An interlocutory decree is where the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing.'* Daniell, Ch. Pl. & Prac. (4th Ed.) 986."

(b) Mr. Simkins, in the 3rd Edition of his work upon "A Federal Equity Suit," appears to treat a

"decretal order" as the same as an interlocutory decree.

(See Simkins, page 470 *et seq.*)

And he appears to do the same in his definition of a decree.

(See Simkins, page 581 *et seq.*)

(c) In Cyc., Vol. 16, page 471, the author says: *"An order made upon motion or petition for the furtherance of the suit, without settling any right or liability pertaining to the substance of the controversy, is properly a decretal order rather than a decree."*

Citing

Haines v. Haines, 35 Mich. 138;
2nd Daniell Ch. Pr. 637.

6.

After a Decree or a Decretal Order, the Court Will Not Allow a Plaintiff to Dismiss His Own Bill, Unless Upon Consent of the Defendant.

Foster's Fed. Prac., Vol. II, Sec. 291;
Daniell Ch. Prac. (5 Am. Ed.), page 793;
Cooper v. Lewis, 2 Phillips Ch. 181;
C. & A. R. R. Co. v. Union R. Mill Co., 109 U. S. 703;
Bank v. Rose, 1 Rich. Eq. (S. C.) 294;
Wall v. Crawford, 11 Paige 472;
Pullman Palace Car Co. v. Central Transfer Co., 49 Fed. 262;
Am. Bell Tel. Co. v. Western Union Tel. Co., 69 Fed. 670.

See also Guilbert v. Hawles, 1 Ch. Cas. 40; Bluck v. Colnaghi, 9 Sim. Ch. 411; Lashley v. Hogg, 11 Ves. Jr. 602; Booth v. Leycaster, 1 Keen's Ch. 255; Biscoe v. Brett, 2 Vesey & B. 377; Collins v. Greaves, 5 Hare 596; Gregory v. Spencer, 11 Beav. 143; Carrington v. Holly, 1 Dick. 280; Anon., 11 Ves. Jr. 169; Cozzens v. Sisson, 5 R. I. 489; Opdyke v. Doyle, 7 R. I. 461; The Atlas Bank v. The Nahant Bank, 23 Pick. 491; Bethia v. M'Kay, Cheve's Eq. (S. C.) 96; Sayer's Appeal, 79 Penn. St.; Seymour v. Jerome, Walk. Mich. Ch. 356.

7.

Where Evidence Has Been Taken or a Cause Has Been Set Down for Hearing, or the Cause Been Referred to a Master, a Dismissal Will Be Granted Only by a Decree Dismissing the Bill Upon Its Merits.

Rumbly v. Stainton, 24 Ala. 712;
Rochester v. Lee, 1 Macn. & G. 767;
Stevens v. The Railroads, 4 Fed. 97;
Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87;
Am. Bell Tel. Co. v. Western Union Tel. Co., 69 Fed. 670.

ARGUMENT.

The writer has tried to follow the rules of this court in stating as succinctly as possible the facts in this case, following the same with a brief of the law points involved and copying the assignment of errors which appears in the transcript.

He trusts that these parts of his brief make any extended argument unnecessary; that in fact they form an argument which shows the right of the defendants and appellants to the reversal of the order and decree dismissing the plaintiff's case.

The bill of complaint charged the defendants with a fraud, viz., charged that the defendants had sold a different and inferior article to the public in the place and stead of a certain article or beverage made by the plaintiff and sold under the name of "Coca Cola." The affidavits on the part of the complainant were to the effect that a certain number of drinks of "Coca Cola" had been ordered at the soda fountain of defendants by persons acting for the complainant, and that these parties had been supplied from a certain spigot, designating the same as the fourth spigot left of the carbonated water spigot, labeled "Coke." [See Tr. page 51.]

The defendants showed by affidavit [Tr. pages 64-72] and by photographs of their soda fountain, that the fourth spigot to the left of the carbonated water spigot of their soda fountain was in fact labeled "Coca Cola" and not "Coke," although there was a spigot on the right side of the carbonated water spigot which was labeled "Coke." They also stated in their affidavits and answer that they had never sold to any person "Coke" or any other drink as and for "Coca Cola." Upon the showing made the court denied the preliminary injunction. The motion was made before Judge Bledsoe.

The plaintiff then set the case for trial. Thereafter, as shown by the record, the plaintiff moved the court

before Judge Trippett to be allowed to dismiss the case. The motion was resisted by the defendants, and the writer, being the attorney for defendants, supported this objection with an affidavit. [Tr. pages 87-90.]

In denying the motion for a preliminary injunction, Judge Bledsoe gave his reasons, to some extent at any rate. The substance of what he said is set out in the writer's affidavit in the record. [Tr. page 89.] The statement in the affidavit reads: "This affiant believes that all the facts in said matter were before this court upon the said hearing for preliminary injunction, and this affiant says that the learned judge who heard said cause stated to plaintiff's attorney and counsel that if said cause were submitted to him upon the facts appearing from the affidavits and exhibits before the court, that the decision would be, and must be, as he, the said judge, viewed the case, in favor of said defendants."

The answer fully denied all the allegations of the bill and the affidavits met and denied all allegations of fraud or of unfair trade in the affidavits. Upon the record as printed, we believe that it is perfectly clear and plain that the defendants have entitled themselves to a decree in their favor.

Thereafter the plaintiff caused the case to be set down for trial and it was so set down.

This, as the defendants claim, gave them the right to proceed with their business without interference by injunction until the case was tried or another motion made, and gave them the right to have the matter fully heard and determined at an early date in the tribunal which had been selected by the plaintiff, and which

tribunal the plaintiff stated in its bill had jurisdiction of the parties and the subject matter of the controversy. We insist that under the law, after these decretal orders, the court had no right to dismiss this case except upon the merits, unless such dismissal was consented to by the defendants. In this case defendants strenuously objected and still object to a dismissal of the case.

(Plaintiff's attorneys had asked defendants' attorney for a stipulation consenting to the dismissal of the cause and frankly stated that they intended immediately to bring an action on the same identical state of facts in the state court. While it is not a part of the record, the writer thinks it will not be disputed by plaintiff's counsel that such action has already been begun in the state court, and the defendants have pled the pendency of this action in the state court as a matter in abatement.)

(1) We do not suppose it will be contended for a moment that from an order and decree of this kind—viz., dismissing the plaintiff's case, as was here done—that an appeal lies. The writer has not found any case disputing this point. Very many of the cases cited in our brief were appeals either from an order and decree of dismissal or from an order refusing to dismiss.

(2) An order dismissing the case, except upon motion, is never granted in the federal practice.

(3) The cases are clear upon the proposition that an injunction in cases of this kind, viz., unfair competition,

are never granted, unless the plaintiff's rights are very clear. Here the plaintiff failed utterly to make out a case as the record stood at the time of the dismissal. We refer to points 1, 2 and 3 of our brief for our authorities upon the above propositions.

(4) The cases hold that the plaintiff will not be allowed to dismiss if in the light of the proceedings the defendant is reasonably entitled to a decree. We insist that upon the record in this case the defendants were so entitled. For this proposition we refer to the cases cited in the fourth point in our brief, as well as to the cases that follow in this argument.

(5) The fifth point in our brief is a definition of the terms "decree" and "decretal order." A "decretal order" is an order by which no question is determined upon the merits, and no right established pertaining to the substance of the controversy. See cases cited in the brief and also found in this argument.

(6) The sixth point in our brief is this: "After a decree or decretal order, the court will not allow plaintiff to dismiss his own bill, unless upon the consent of the defendant." We have cited numerous authorities under the sixth point in our brief. We claim that the order denying an injunction, as well as the order setting the cause for trial were each decretal orders. *We claim that the record shows upon its face that as the cause stood, the defendants were entitled to a decree dismissing the cause upon its merits, and that under these circumstances an order and decree dismissing the action was erroneous against law, and clearly prejudicial to the defendants.*

We beg to be allowed to refer at some length to certain authorities in support of our contentions, setting out excerpts both from text writers and adjudged cases.

(a) We refer to Hershberger v. Blewett, 55 Fed. 170. In this case an action was begun involving the title to real estate; a demurrer to the bill had been sustained and an amended bill filed. The defendants then answered and exceptions to and answer had been submitted to the court and overruled. Some three months thereafter the complainants filed a motion to dismiss without prejudice on payment of costs. No evidence had been taken and no application made to the court to enlarge time for taking evidence. The defendants opposed the motion, claiming that the dismissal of the action would seriously injure them. *The decision denying the motion is by Judge Hanford. Among other things, it is said: "By the court's decisions of the questions which had been argued and decretal orders, the claims and rights of the parties have been adjudicated."*

(Comment.) We ask, is not this case squarely in point here? Why should not these defendants have been allowed to have this case finally tried and determined upon its merits. That is what they sought and it does seem to us that to that they were clearly entitled.

(b) The names of these plaintiffs are often found in the books in actions similar to this. We wish to refer to the case of Coca Cola Co. v. Branham, 216 Fed. 264. In that case it was held: "That certain purchasers of 'Coca-Cola' prepared and sold by plaintiff, referred to it as 'Koke' did not entitle plaintiff to enjoin defendants from selling a somewhat similar

beverage under the name of 'Koke,' on the theory that by adoption or user the name 'Koke' had become a secondary trade-name of plaintiff's product, where plaintiff had neither adopted nor used such name in connection with its beverage." (Comment.)

In that action the complainant's bill appears to have been quite similar to the one here filed. The complainant seems to have depended both upon the copyright upon the name "Coca Cola" and upon the color of the beverage and also claimed that the defendant was selling "Koke" as and for "Coca Cola." As to these matters, the court on page 266 said:

"It is true that it appears in testimony that it is the custom of dealers, in serving the two beverages, to remove the tin caps from the bottles, so that the purchaser does not see the name thereon, but that would be true as to any beverage of like or similar color to 'Coca-Cola.' *According to the testimony of plaintiff's agent, there are 181 beverages having practically the same color as Coca-Cola.* Defendants cannot be held responsible for what their customers did without aid, suggestion, or inducement from them.

"Plaintiff also argues that 'Koke' has become the 'secondary name' of its product, because it appears from the proof that some persons desiring that product say to the dealer, 'Give me a Koke.' A trade-name may be acquired by adoption or user. In their brief, counsel for plaintiff quote the following from 38 Cyc. 765:

" 'Trade-names are acquired by adoption and user and belong to the one who first used them and gave them a value.'

"But plaintiff has never used the word 'Koke' in con-

nection with its product. It has taken and used the name Coca-Cola. The use of the word, 'Koke,' as applied to the product of plaintiff, has been, so far as the testimony shows, by persons upon their volition without being moved thereto by defendants. If the use of the name had been observed by defendants, and it was afterwards adopted by them, with the purpose and intention of taking advantage of that fact and to engage in the manufacture and sale of a beverage and call it 'Koke,' and sell it 'as and for Coca-Cola,' then a case of unfair competition would undoubtedly be made out."

(Comment.) *The court dissolved the temporary restraining order and dismissed the plaintiff's bill.*

(c) In Foster's Federal Practice, Vol. II, section 291, the author says:

"The plaintiff may dismiss his bill without costs at any time before the defendant's appearance.

"After an appearance *and before a decree or decretal order,* a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared; *but not, if any of them would be injured thereby.* (n. 'This whole sentence was quoted with approval by Newman J. *re* Wellhouse, 113 Fed. 962; and the text was quoted with approval by Hanford J. in Hershberger v. Blewitt, 55 Fed. 170; Cooper v. Lewis, 2 Phil. 178; Ainslie v. Sims, 17 Beav. 174; Booth v. Leycester, 1 Keen. 274; Bank v. Rose, 1 Rich. Eq. (S. C.) 292; Stevens v. The Railroads, 4 Fed. 97; see Western Union Tel. Co. v. Am. Bell Tel. Co., 50 Fed. 662. (Look at Ga. P. T. Co. v. Bilfinger, 129 Fed. 121.))'" (Italics ours.)

(d) In Bates on Federal Equity Procedure, Vol. II, p. 709, section 659, the learned author says (after discussing in the preceding paragraph the English rule, which is the same as in America):

"The plaintiff in an original bill of equity in the Circuit Court of the United States has, as a general rule, the right at any time, upon payment of costs, to dismiss his bill; *but this rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitled the defendant to a decree, the plaintiff will not be allowed to dismiss his bill without the consent of the defendant; and it is well settled that the plaintiff can in no case dismiss his bill without an order of court.*" (Italics ours.)

(Citing Chicago & Alton R. R. Co. v. Union R. Mill Co., 109 U. S. 702; quote Stevens v. The Railroads, 4 Fed. 97; Electric Accumulator Co. v. Brush El. Co., 44 Fed. R. 602; Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87; Hershberger v. Blewett, 55 Fed. 170; Am. Bell Tel. Co. v. Western Union Tel. Co., 69 Fed. 666; Carner v. Second National Bank, 66 Fed. 369; Pullman Pal. Car Co. v. Central Transf. Co., 49 Fed. 261; City of Detroit v. Detroit City R. R. Co., 55 Fed. 596; Gregory v. Pike, 67 Fed. 837.)

(e) C. & A. R. R. Co. v. Union Rolling Milling Co., 109 U. S. 703, and beginning on page 713 the court says:

"The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

"It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

"The rule is stated as follows in Daniell's Chancery Practice, page 793, 5th Am. Ed.:

" '*After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill,* unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.'

"The same writer, page 794, says that:

" 'After a decree has been made, of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill.'

"The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the lord chancellor in Cooper v. Lewis, 2 Phillips Ch. 181, as follows:

" 'The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted; it is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff.'

"In Bank v. Rose, 1 Rich. Eq. (S. C.) 294, it was said:

" *'But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted.'*

"So in the case of Connor v. Drake, 1 Ohio St. 170, the Supreme Court of Ohio declared:

" 'The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defense, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the

court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill.'

"Chancellor Walworth in the case of Wall v. Crawford, 11 Paige 472, laid down the rule in these words:

" '*Before any decree or decretal order* has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. *The complainant in such a case cannot dismiss without the consent of all parties* interested in the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court.' "

See also Guilbert v. Hawles, 1 Ch. Cas. 40; Bluck v. Colnaghi, 9 Sim. Ch. 411; Lashley v. Hogg, 11 Ves. Jr. 602; Booth v. Leycester, 1 Keen's Ch. 255; Biscoe v. Brett, 2 Vesey & B. 377; Collins v. Greaves, 5 Hare 596; Gregory v. Spencer, 11 Beav. 143; Carrington v. Holly, 1 Dick. 280; Anon., 11 Ves. Jr. 169; Cozzens v. Sisson, 5 R. I 489; Opdyke v. Doyle, 7 R. I. 461; The Atlas Bank v. The Nahant Bank, 23 Pick. 491; Bethia v. M'Kay, Cheve's Eq. (S. C.) 96; Sayer's Appeal, 79 Penn. St.; Seymour v. Jerome, Walk. Mich. Ch. 356.

(f) In Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 602, the court says:

"While there is no doubt of the general proposition that a plaintiff in an equity suit may dismiss his bill at any time before the hearing, *it is equally well settled that he cannot do so without an order of court,*—a practice which implies a certain discretion on the part of the court to refuse such order if, under the particular facts of the case, *a dismissal would be prejudicial to the rights of the defendant.* Leave to discontinue has been denied where the defendant has set up a counter-claim which would be barred by the statute of limitations. Van Alen v. Schermerhorn, 14 How. Pr. 287. Where the defendant pleaded an estoppel, which, if established, would amount to a defeasance of a lien claimed by the plaintiff on his property, and which it was the object of the bill to enforce: Stevens v. Railroad, 4 Fed. Rep. 97,—a most satisfactory opinion by Judge Hammond. Where defendant sought to dismiss his cross-bill after the original and cross-bill had been set down to be heard together; the court remarking that the plaintiff could not dismiss his bill when by so doing he might prejudice the defendant: Booth v. Leycester, 1 Keen 247. Where a general demurrer had been overruled upon argument, and defendant had appealed: Cooper v. Lewis, 2 Phil. Ch. 178. After an order to account and a report has been made: Bethia v. McKay, Cheves Eq. 93, overruling Bossard v. Lester, 2 McCord Eq. 419. Or where a cross-bill was filed to a bill of foreclosure: Bank v. Rose, 1 Rich. Eq. 292; the court observed that *'whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble*

of bringing a new suit, and making his proofs anew, such dismissal will not be permitted.'"

(g) In Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87, held:

"A complainant is not entitled as of right to dismiss a bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation."

In this case Judge Lacombe said:

"Should the defense set up by the defendants be made out by the proof, they would be entitled to a decree not simply denying complainant's right to money damages, or an accounting, but also declaring the license upon which the suit is brought to be fraudulent and void, and directing its cancellation. *The complainant is, therefore, under the authorities, not entitled as of right to dismiss its own bill at this stage of the case.* Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. Rep. 602; Stevens v. Railroads, 4 Fed. Rep. 97. Nor, under all the circumstances, should it be allowed to do so. If complainant suffers default, defendants may take a decree dismissing the complaint, declaring the license void, and directing its cancellation; but such decree will, of course, show upon its face that it was entered upon default. Should the complainant be unwilling to suffer default, the time to file briefs named in the former order is extended to and including April 6th, and they need not be printed." (Italics ours.)

(h) In Pullman's Palace-Car Co. v. Central Transp. Co., 49 Fed. 262, the court says:

"Butler, district judge. The bill which the plaintiff asks leave to withdraw, avers (among other things) that the lease therein named is invalid; and furthermore, that (if it is not) the plaintiff is authorized by its eighth section, and the happening of a contingency therein stated, to terminate it, on notice to the defendant; that the contingency has happened, the authority been exercised and notice given. It therefore prays the court to enjoin the defendant against proceeding at law to collect rent under the lease; to assist the plaintiff in making delivery of the leased property, and in ascertaining what compensation should be rendered to the defendant for its previous use; and generally to afford its aid in settling the controversy which has arisen out of the transactions between the parties, and terminating finally, their relations. The court, acknowledging the plaintiff's right to terminate the lease under the circumstances stated, granted an injunction against proceeding at law to recover rent accruing subsequently to such notice; and declined to interfere with an action, then pending, brought to recover rent previously due, because the question of validity raised, could be interposed and decided on the trial thereof. Subsequently on such trial, and review by the Supreme Court, the lease was found to be invalid. The plaintiff in the bill now seeks to discontinue proceedings under it, while the defendant endeavors, through the instrumentality of a cross-bill, to avail himself of its use as a means of recovering possession of his property, or its equivalent, and com-

pensation for the plaintiff's enjoyment of it under the lease. We do not think the plaintiff's motion should prevail. *The propriety of allowing discontinuances in equity depends upon whether defendants may be prejudiced thereby. A decree, or decretal order, entered is usually a conclusive answer to the application.* Here, not only was such an order entered, but it now appears that the proceeding, or a similar independent one commenced by himself, is the defendant's only means of enforcing his rights—rights which the bill in a measure concedes. The principal object of the proceeding, originally, was to accomplish the object which the defendant now seeks; and considerable testimony has been taken with a view to this end. The defendant would, therefore, be seriously prejudiced by its discontinuance. Not only would he lose the benefit of this testimony, but he would also be delayed, and might be compelled to seek the plaintiff in another jurisdiction. The object of the cross-bill is to enable the defendant to assume an aggressive attitude in the proceeding, and to use it as a means of settling and closing up the entire controversy on which it is founded. This object seems proper and commendable; and we do not find anything in the rules governing equity pleading, which forbids its allowance. The decisions in which it has been held that cross-bills come too late after answers have been filed—that they should be presented as soon as practicable, so as to avoid delaying the plaintiff's efforts to obtain a trial,—are not applicable to the circumstances of this case. The plaintiff's motion must therefore be dismissed and the defendant's allowed." (Italics ours.)

(i) In Am. Bell Tel. Co. v. Western Union Tel. Co., 69 Fed. 670, the court says:

"The single question contested is the right of the complainant thus to dismiss their bill. To the discussion of this question great learning and extensive examination of authorities have been devoted. But in the opinion of this court the question lies in narrow compass. *All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion. Such rights were acquired in this cause by the reference of the parties to the master, approved and confirmed by the decretal order of the court. The defendant, by the concurrent force of the stipulation of the parties to refer to the master 'to hear the parties, report the facts, and his rulings on any question of law arising in the case,' and of the order of court, acquired the right to have the hearing before the master, his report, and the decision of the master thereupon. Neither party could, at his pleasure, revoke or rescind the reference so made and confirmed.*" (Italics ours.)

(Comment.) The appellants call especial attention to the foregoing holding of the court.

If the reference of a case to a master constitutes a "decretal order" and deprives the complainant of the right to dismiss its case, did not the order—after hear-

ing—denying the right to a temporary injunction, and the order setting the case for trial upon the motion of the plaintiff, place this complainant in the same position? We think the cases which we have cited in our brief and this argument make this proposition perfectly clear and conclusive.

We have tried to show by our statement of facts, our brief and the cases cited in this argument that the order dismissing this case and the decree following it were very prejudicial to the defendants and against law. We think the cases clearly support our position that the decree and order dismissing the case should be reversed and set aside and that these defendants have a right to try this case in the tribunal selected, in the first instance, by this complainant, or the complainant should submit to a final decree upon the merits.

Begging pardon for the length of our brief, we respectfully submit the matter to the court.

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